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Nos. 85-441 and 85-460

In the Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, APPELLANT

v.

BURLINGTON INDUSTRIES, INC.

IRVING GILBERT, ET AL., APPELLANTS

v.

BURLINGTON INDUSTRIES, INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer's policy of providing severance pay to eligible employees is an "employee welfare benefit plan" under ERISA, thus preempting state statutory and common law causes of action that relate to the severance pay policy.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1982 Burlington Industries, a textile manufacturer, sold its sock and hosiery divisions as going concerns to Kayser-Roth Hosiery, Inc. Prior to the sale, Burlington arranged for the individual appellants, 36 former Burlington employees who worked in 16 different states but reported to Burlington's merchandising headquarters in New York, to continue working with the divisions following their acquisition by Kayser-Roth. All

of the individual appellants, except one who retired, continued to hold the same positions with Kayser-Roth that they previously held while employed by Burlington. J.S. App. A5.[1]

Burlington maintained a severance pay policy which was summarily described in an employee handbook and fully set forth in a company policy manual. The severance pay policy provided that "regular full-time salaried employees" experiencing either "job elimination" or certain other "involuntary terminations" were eligible for severance payments.[2] The grant or denial of severance pay occurred immediately upon termination of employment and benefits were payable from the company's general assets rather than from a separate fund. Burlington determined that appellants were not eligible for severance benefits under its policy because their jobs were not terminated. J.S. App. A5-A7.[3]

2. Burlington's former employees sought to obtain severance pay from the company on the theory that they became entitled to benefits when they ceased working for

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[1] The district court stated that appellants were employed by Kayser-Roth "at the salaries or rates of pay received previously from Burlington" (J.S. App. A22). The court of appeals, in contrast, noted that appellants contend that Kayser-Roth employed them at a lower rate of compensation (*id.* at A5).

[2] The policy states that "job elimination" includes "terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes" and that "other involuntary terminations" include "terminations due to unsatisfactory job performance which is not willful." J.S. App. A23. The amount of the severance payment is determined from tables contained in the policy and depends on factors such as age, salary, and years of service (*ibid.*).

[3] Burlington agreed to provide severance pay to any employee terminated by Kayser-Roth within six months after the sale (85-929 Pet. App. A11). Appellants contend that about one-third of them have been terminated by Kayser-Roth—presumably after the six-month period—and that Kayser-Roth has no severance pay policy, so that the terminated employees received little or no severance pay (85-460 J.S. 4 n.3).

Burlington and began working for Kayser-Roth. In state administrative proceedings, the New York State Commissioner of Labor ordered Burlington to comply with claims that ten of the individual appellants in this action had filed with the State Department of Labor pursuant to Section 198-c of the State Labor Law.[4] Burlington appealed the Commissioner's order to the New York State Industrial Board of Appeals. Appellants then brought this action in the United States District Court for the Southern District of New York, alleging four claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. II) 1001 *et seq.*, and, in the alternative, seven state law causes of action. The Commission intervened as a plaintiff, and the Board stayed enforcement of the Commissioner's order and held the administrative appeal in abeyance pending determination of the present action (J.S. App. A25).

Burlington sought dismissal of appellants' claims, contending that their state law claims are preempted by 29 U.S.C. 1144(a), which provides that ERISA "supersede[s] any and all State laws insofar as they * * * relate to any employee benefit plan." The district court dismissed the state law claims. It first held that Burlington's severance pay policy is an "employee welfare benefit plan" within the coverage of ERISA (J.S. App. A26). The court noted that Burlington did not contend that its severance pay policy was a *pension* plan but that it was a *welfare* plan as defined in 29 U.S.C. 1002(1).[5] Respond-

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[4] That statute makes it a misdemeanor for an employer to fail or refuse to pay or provide "benefits or wage supplements," which are defined by the statute to include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." N.Y. Lab. Law § 198-c (McKinney 1986).

[5] Section 1002(1) defines "employee welfare benefit plan" (or "welfare plan") to mean "any plan, fund, or program * * * established or maintained * * * for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal

ing to appellants' argument that Burlington's severance pay policy is not a welfare plan "because there is no *plan* as such, but simply a naked promise to pay severance benefits" (J.S. App. A27 (emphasis in original)), the court, following *Donovan* v. *Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc), concluded that Burlington's severance pay policy "is a plan, established by an employer, for the purpose of providing * * * [a covered] benefit to its participants, the Burlington employees, thruogh the use of general corporate assets" (J.S. App. A28). The district court also rejected appellants' arguments that welfare plans must be separately funded in order to be covered by ERISA (*id.* at A28, A30).[6] And the court concluded, contrary to appellants' contentions, that while the statute's fiduciary and reporting provisions establish responsibilities of plan fiduciaries and administrators, they do not set forth prerequisites for ERISA coverage (*id.* at A29).[7] The court added that an interpretive bulletin issued by the Department of Labor stated that welfare plans do not have to have a funding procedure and that a statement accompanying proposed amendments to ERISA regulations stated that "severance pay plans would in virtually all cases be welfare plans" (*id.* at A30, citing 29 C.F.R. 2509.75-5 (1980) and 44 Fed. Reg. 11763 (1979)).

Having determined that Burlington's severance pay policy is covered by ERISA, the court held that ERISA

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services, or (B) any benefit described in section 186(c) of this title * * *."

[6] In that connection, the court explained (J.S. App. A29) that although 29 U.S.C. 1002(1)(B) refers to benefits "described in" 29 U.S.C. 186(c), and that Section mentions "pooled * * * severance or similar benefits," that reference did not mean that severance pay benefits had to be pooled in order to be covered by Section 1002(1)(B). Appellants have abandoned this argument (see 85-460 J.S. 7-8 n.7).

[7] ERISA imposes certain uniform standards on the design, administration, and operation of all employee benefit plans, including rules concerning reporting, disclosure, and fiduciary responsibility. 29 U.S.C. (& Supp. II) 1021-1031, 1101-1114.

preempts appellants' state law claims because they "relate to" an employee benefit plan (J.S. App. A30-A31).[8] The court therefore dismissed the state law claims and permanently enjoined the state administrative proceedings; it did not dismiss appellants' ERISA claims. Pursuant to Fed. R. Civ. P. 54(b), the district court certified its decision for immediate review by the court of appeals. J.S. App. A34-A35.

3. The Second Circuit affirmed (J.S. App. A1-A20). The court agreed with the district court's conclusion "that Burlington's severance pay policy was an ERISA plan" (*id.* at A7). The court rejected appellants' argument that "a promise or agreement to pay severance benefits, without more," is not a welfare plan (*id.* at A9). The court instead found that the severance pay policy is a welfare plan under Section 1002(1)(A), which includes plans providing unemployment benefits in the definition of welfare plans, since severance pay is a type of unemployment benefit (J.S. App. A10). The court also concluded that the severance pay policy is a welfare plan under Section 1002(1)(B) which refers to severance pay by means of its reference to Section 186(c), which specifically mentions severance pay (J.S. App. A10). The court noted that a Department of Labor regulation states that welfare plans include plans that pay severance benefits (*id.* at A11, citing 29 C.F.R. 2510.3-1(a)(3)), concluding that that regulation is reasonable (J.S. App. A12).

The court also rejected appellants' argument that ERISA covers only separately funded severance pay plans (J.S. App. A11-A12). And it rejected their argument that Burlington's unfunded severance pay policy should be considered to be a "payroll practice" which is excluded from ERISA coverage under the Department of Labor's regulations (*id.* at A13).[9] As did the Ninth Cir-

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[8] Appellants have abandoned their argument that their state law claims do not "relate to" an ERISA plan. See 85-441 J.S. 7 n.**; 85-460 J.S. 7-8 n.7.

[9] To clarify the definition of "welfare plan," the regulation identifies as outside the scope of the definition certain "payroll practices" including arrangements whereby an employee continues to receive

cuit in *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (1985), the court noted that the payroll practices enumerated in 29 C.F.R. 2510.3-1 cover payments made "during the course of employment, while severance pay occurs only after termination" (J.S. App. A13).

The court accordingly held that ERISA preempts appellants' state common law claims and their claims based on N.Y. Lab. Law § 198-c (McKinney 1986). It stated that "[t]o hold otherwise would undermine the uniformity in plan administration that [ERISA] was designed to promote" (J.S. App. A17).[10]

Finally, the court of appeals considered whether Burington should be estopped from raising the preemption defense because, as appellants contend without contradiction, Burlington failed to comply with ERISA's reporting

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compensation from an employer's general assets during periods of absence. 29 C.F.R. 2510.3-1(b). Severance pay is not included among the "payroll practices" enumerated in the regulation.

[10] Two hundred other Burlington employees affected by the sale filed a similar action in the United States District Court for the Middle District of North Carolina, alleging claims based on ERISA and state law claims as well. As in this case, the employees first obtained a favorable administrative ruling from state officials. When federal court proceedings commenced, the Commissioner of Labor for the State of North Carolina intervened in that action. The district court held in that case that ERISA preempted the plaintiffs' state law claims. It also held that Burlington's decision to deny severance pay was not arbitrary or capricious and dismissed their ERISA-based claims. It based its conclusion that the employees could not recover under ERISA on its finding that "Burlington established its severance policy for the purpose of providing financial support to employees whose jobs are lost through no willful fault of their own and who might therefore be in need of financial resources during a period of unemployment" (85-929 Pet. App. A61). The Fourth Circuit affirmed (*id.* at A1-A43). It stated that because "unemployment compensation was undoubtedly a major purpose of the plan," Burlington's decision not to award severance pay, "though not compelled by the plan's language, is certainly a reasonable one" (*id.* at A38-A39). The individual plaintiffs in this related case have filed a petition for a writ of certiorari (No. 85-929) and the North Carolina Commissioner has filed a jurisdictional statement (No. 85-944), both of which are pending before the Court.

and disclosure requirements with respect to its severance pay policy until after suit was filed in this case. The court concluded that it would be undesirable to hold Burlington estopped and therefore subject to inconsistent treatment of claims under state law (J.S. App. A19). The court did not consider appellants' claims based on ERISA, leaving that question for determination by the district court on remand (*ibid.*).[11]

ARGUMENT

The court of appeals correctly determined that Burlington's severance pay policy is a welfare plan covered by ERISA. Therefore, the court was also correct in holding that appellants must seek relief under federal, not state, law. The decision below is consistent with the language and legislative history of ERISA and the contemporaneous construction of the statute by the United States Department of Labor, the agency charged with responsibility for enforcing the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. Moreover, the court of appeals' decision is in accord with the decisions of all other courts

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[11] Following the approach adopted in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1354 (9th Cir. 1984), cert. denied, No. 84-2009 (Oct. 7, 1985), the court concluded that it would be appropriate to scrutinize Burlington's decision not to award severance pay while at the same time indicating that the arbitrary and capricious standard of review should be applied in reviewing Burlington's construction of its severance pay policy. J.S. App. A18-A19. Such an approach, the court stated, "eliminates any incentive on the part of employers not to comply with the Act's reporting, disclosure and fiduciary requirements" (*id.* at A19). In following *Blau*, the court contrasted its approach with the approach taken by the district court in the case brought by Burlington employees in North Carolina (J.S. App. A18) since that court applied the arbitrary and capricious standard without considering Burlington's failure to comply with ERISA's reporting and disclosure provisions. The Fourth Circuit, in turn, which issued its decision after the Second Circuit, stated that it applied the arbitrary and capricious standard to all claim eligibility disputes and saw "no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard" (85-929 Pet. App. A37).

of appeals that have considered the issue, and does not conflict with any decision of this Court. Therefore, although in our view this case is properly brought as an appeal, it does not warrant plenary review.

1. This case is properly brought as an appeal pursuant to 28 U.S.C. 1254(2), which provides for review "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States," because the court of appeals has held Section 198-c of New York's Labor Law unconstitutional under the Supremacy Clause. *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 515 n.7 (1984); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 7 & n.6 (1983). Burlington argues that there is no basis for appeal because this case is similar to *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), in which the Court held that appeal was not proper where a court of appeals invalidated a punitive damages award because federal law prohibited such an award. The Court explained its decision in *Silkwood* by stating that the court of appeals "did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs. While the award itself was struck down, the statute authorizing such awards was left untouched." *Id.* at 247.

"Jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional on its face or as applied" (*Burger King Corp.* v. *Rudzewicz*, No. 83-2097 (May 20, 1985), slip op. 8 n.12 (emphasis in original)). This case falls in the Court's appellate jurisdiction under 28 U.S.C. 1254(2). Section 198-c of New York's Labor Law provides that it is a misdemeanor for an employer to refuse to pay benefits, including "separation * * * pay," and appellants seek to enforce that provision. Unlike *Silkwood*, the court of appeals expressly recognized that this case presents the issue whether Section 198-c is

preempted by ERISA (J.S. App. A8) and held that it is preempted (*id.* at A16). Thus, Section 198-c is not left "untouched," like the Oklahoma punitive damage awards statute in *Silkwood*. Rather the court of appeals has held that the statute may not be used to enforce promises by private employers to provide severance pay even though it applies by its terms in such cases. Since the court of appeals clearly held the statute unconstitutional as applied, this case is reviewable under Section 1254(2).[12]

2. Every court of appeals that has considered the question has concluded that an employer's unfunded severance pay policy is an employee welfare benefit plan covered by ERISA. In addition to the court below, the Fourth Circuit so held in the related case brought by other Burlington employees (see note 10, *supra*), and the Ninth Circuit has repeatedly held that unfunded severance pay policies are welfare plans. *Jung* v. *FMC Corp.*, 755 F.2d 708, 710 & n.2 (9th Cir. 1985); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502-1503 (9th Cir. 1985); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), cert. denied, No. 84-2009 (Oct. 7, 1985).[13] Appellants have

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[12] Burlington's other arguments in support of its contention that this case does not present an appeal are insubstantial. Its argument (Mot. to Dis. or Aff. 8-9) that Section 198-c does not provide a private right of action appears to be wrong (see Appellants Jt. Br. in Opp. to Mot. to Dis. or Aff. 1-2) and is in any event irrelevant since the appellant in No. 85-441, the New York Commissioner of Labor, plainly has standing to enforce the law. Nor does it matter that appellants have abandoned the argument that their claims do not "relate to" ERISA. Although the issue presented is whether Burlington's severance pay policy is a welfare plan under ERISA, the parties agree that that question is significant because its answer determines whether Section 198-c is preempted.

[13] The Seventh and Eighth circuits, in ruling on ERISA claims involving severance pay provisions set forth in employer policy manuals, have implicitly held that informal, unfunded severance pay policies are covered by the statute. *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1210 & n.1 (7th Cir. 1983); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981), aff'g, 491 F. Supp. 1188, 1190, 1196 (E.D. Mo. 1980); see also *Sutton* v. *Weirton Steel Division of National Steel Corp.*, 724

cited no case that conflicts with the decision below, and we are not aware of any. Because severance pay policies, whether funded or unfunded, are welfare plans, appellants' state law claims are preempted by ERISA.

a. ERISA defines two categories of "employee benefit plans": employee welfare benefit plans and employee pension benefit plans. 29 U.S.C. 1002(3). Employee welfare benefit plan, the category relevant to this case, is defined as "any plan, fund, or program * * * established or maintained by an employer" for the purpose of providing specified benefits, including medical, disability, death, unemployment, and vacation benefits (29 U.S.C. 1002 (1) and (A)), and "any benefit described in section 186(c) of [Title 29]" (29 U.S.C. 1002(1)(B)). Section 186(c), enacted as part of the Taft-Hartley Act of 1947, enumerates the types of contributions an employer may legally make to a union trust fund, and includes contributions "paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, *severance* or similar benefits" (29 U.S.C. 186 (c)(6) (emphasis added)).

As this Court has several times observed, Congress intended ERISA to occupy the field of benefit plan regulation to the exclusion of the states in order to foster the development of such plans by relieving employers of potentially conflicting state requirements. See *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 13; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-523, (1981). ERISA therefore preempts (with certain exceptions not applicable here, see 29 U.S.C. (& Supp. II) 1144(b)) "any and all State laws" that "relate to any employee benefit plan" as defined in the Act. 29 U.S.C. 1144(a).[14] If the Burlington

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F.2d 406, 409 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); *Pinto* v. *Zenith Radio Corp.*, 618 F.2d 110 (7th Cir. 1980) (Table), aff'g 480 F. Supp. 361 (N.D. Ill. 1979).

[14] Appellants did not raise, and the courts below did not consider the issue whether N.Y. Lab. Law § 198-c (McKinney 1986) is saved

severance pay policy is an "employee benefit plan" within the meaning of ERISA, the New York state law must be held to be preempted, because that law requires payment of separation benefits and thus clearly "relate[s] to" the company's policy.[15]

Appellants' primary contention is that Burlington's severance pay policy cannot be considered a "plan, fund, or program" within the meaning of ERISA's definition of "employee benefit plan." 85-460 J.S. 8-11; 85-441 J.S.

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from preemption by the exception in Section 514(b)(4) of ERISA for "any generally applicable criminal law of a State." 29 U.S.C. 1144(b)(4). The government agrees with other courts that have considered the question, however, that by limiting this exception to laws of "general" applicability, Congress expressed an intent to preempt state laws, such as Section 198-c, which are directed specifically at employee benefit plans. *Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund* v. *Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 563 (E.D. N.Y. 1983) (N.Y. Lab. Law § 198-c (McKinney 1986) is not a criminal law of general applicability); see also *Sforza* v. *Kenco Constructional Contracting, Inc.*, 629 F. Supp. 489, 491-492 (D. Conn. 1986) (and cases cited). Moreover, as one court has held, even if N.Y. Lab. Law § 198-c (McKinney 1986) were considered a generally applicable criminal law, ERISA's criminal law exception cannot be construed to save civil actions implied from state criminal statutes. See *Calhoon* v. *Bonnabel*, 560 F. Supp. 101, 109 (S.D.N.Y. 1982). But see, *e.g.*, *Goldstein* v. *Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (Civ. Ct. 1978) (since Section 198-c is a generally applicable criminal law as defined by New York law, it is saved from ERISA preemption).

[15] While appellants do not argue that their state law claims do not relate to ERISA, state amici argue (Br. 16-17) that there is a conflict in the circuits on the issue of whether ERISA preempts related state law claims, citing *Carpenters Health & Welfare Fund* v. *Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983). The court in that case decided a pendent state law claim in an action to collect delinquent pension contributions under the terms of a collective bargaining agreement. *Id.* at 281. The Third Circuit rejected without discussion the employer's argument that ERISA preempted the state law claim. *Id.* at 282 n.5. In the absence of any indication from the Third Circuit as to the basis of its holding, the decision in that case cannot be read as creating a conflict with cases holding, as Section 1144 plainly commands, that state law claims related to ERISA are preempted.

10-13. They argue that the court of appeals simply did not consider the threshold issue of the existence of a plan, and indeed that "[t]here is not a single case, nor a single court, that has truly addressed [this] issue" (85-460 J.S. 11). These contentions are simply incorrect. In *Donovan* v. *Dillingham*, 688 F.2d 1367 (1982) (en banc), the leading case construing the term "plan" for purposes of applying ERISA's definitions and coverage provisions, the Eleventh Circuit squarely addressed the question of what constitutes the establishment of a plan under ERISA. The court concluded that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" (*id.* at 1373). The *Dillingham* formulation gives a common sense meaning to the statutory language which connotes an identifiable benefit policy without specifying what form that policy must take. The district court in this case expressly followed *Dillingham* (J.S. App. A27-A28) and the court of appeals affirmed, noting its approval of the district court's "well-considered opinion * * * that Burlington's severance pay policy was an ERISA plan" (*id.* at A7). The standards articulated in *Dillingham* also have been followed uniformly by all the courts of appeals that have considered the question of whether an employer's benefit policy constitutes an ERISA plan. *Scott*, 754 F.2d at 1503-1504; *Blau*, 748 F.2d at 1352; see also *Dependahl*, 491 F. Supp. at 1195.

Contrary to the contentions of appellants and state amici (85-460 J.S. 17; States Amici Br. 13) nothing in the language or structure of ERISA suggests that in order to meet the definition of "employee welfare benefit plan" a severance pay policy must be funded. The statute's definitional and coverage provisions contain no funding requirements or limitations. See 29 U.S.C. 1002(1) and 1003(a). Had Congress intended to limit coverage of the Act to separately funded plans it could have so stated. Instead, Congress defined "welfare plan" broadly to include not just any "fund," but any "plan, fund or

program" that provides covered benefits. 29 U.S.C. 1002(1). Moreover, in defining the statute's pattern of regulation, Congress repeatedly distinguished between funded and unfunded plans. For example, the statute's requirement that plan fiduciaries be bonded expressly does not apply "where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer." 29 U.S.C. 1112(a)(1). Obviously such an exemption would be superfluous if Congress had defined employee welfare benefit plans to include only benefit plans that have a separate source of funding. Welfare plans also are exempted altogether from ERISA's specific funding requirements. 29 U.S.C. 1081(a)(1).[16] These provisions amply demonstrate that Congress intended ERISA to regulate welfare plans irrespective of their method of financing.

The Department of Labor has consistently interpreted the definition of "welfare plan" to include unfunded severance pay plans. The Department published regulations less than a year after the Act's passage construing ERISA's coverage provisions. 29 C.F.R. Pt. 2510. The regulations clarify that severance pay plans generally are categorized as "welfare plans" rather than "pension plans" and thus are not subject to the funding and other requirements that ERISA imposes on pension plans. 29 C.F.R. 2510.3-2(b). And, in advisory opinions interpreting the Act, the Department has consistently found that unfunded severance plans are governed by ERISA. See, *e.g.*, Advisory Op. 81-55A (June 26, 1981); Advisory Op. 76-66 (June 2, 1976). This longstanding interpretation of the Act by the agency charged with its administration is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); see also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

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[16] See also, *e.g.*, 29 U.S.C. 1051(2), 1081(a)(3), 1101(a)(1) (excepting unfunded deferred compensation plans from the Act's participation and vesting, funding, and fiduciary responsibility provisions).

In 1980 Congress ratified the Department's interpretation by amending 29 U.S.C. 1002(2) expressly to authorize the Department to treat severance pay arrangements as welfare plans. The amendment provided that "[t]he Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which—(1) severance pay arrangements * * * shall, for purposes of this title, be treated as welfare plans rather than pension plans" (Pub. L. No. 96-364, § 409, 94 Stat. 1307). See also, 126 Cong. Rec. 20208 (1980) (joint explanation of amendments). Thus Congress, by adopting this amendment after the Department had promulgated its regulations, effectively approved the Department's interpretation of the Act to cover unfunded severance pay plans, as the Fourth Circuit recognized in the related case arising from Burlington's sale of its sock and hosiery divisions to Kayser-Roth (85-929 Pet. App. A21-A22). That court and the Ninth Circuit have expressly rejected arguments, similar to those raised by appellants here, that a severance pay plan must be funded in order to be covered by the Act. *Scott*, 754 F.2d at 1503.

The Department's regulations also clarify that although the definition of "welfare plan" refers to "any benefit described in [29 U.S.C.] 186(c)" which in turn lists "*pooled* severance [and other] benefits" (emphasis added), this language does not indicate that severance benefits must be funded separate from the general assets of the employer in order to be covered by ERISA. 29 C.F.R. 2510.3-1(a)(3). As analyzed by the regulations, "the effect of [the cross-reference] is to include within the definition of 'welfare plan' those plans which provide * * * severance benefits, and benefits which are similar" (*ibid.*). This conclusion is quite clearly correct. The word "pooled" is used in Section 186(c) in the context of "money * * * paid by any employer to a trust fund established by such representative," meaning money paid to a fund set up by a union or other employee representative. Thus if the reference to Section 186(c) were taken to encompass not just the type of benefit but also

the arrangement for payment of benefits described in Section 186(c), ERISA's coverage would be limited not just to funded severance benefit plans but to "pooled" severance benefit plans set up by a union or some other entity separate from the employer. Thus the argument that the reference to Section 186(c) requires severance plans to be funded or "pooled" in order to be covered by ERISA proves too much. Indeed appellants have abandoned this argument.[17]

b. Appellants argue (85-441 J.S. 16-18) that Burlington's severance pay policy is a "payroll practice" that is excluded from ERISA's definition of "employee welfare benefit plan" by the Department of Labor's regulations. This argument is incorrect. The court of appeals here (J.S. App. A13) and the other courts of appeals that have considered the issue uniformly and correctly have held that the payment of severance benefits from general assets does not constitute a "payroll practice" under 29 C.F.R. 2510.3-1(b). 85-929 Pet. App. A22-A24; *Scott*, 754 F.2d at 1502-1503. As we have shown, the Department of Labor has consistently interpreted ERISA to cover unfunded severance pay plans. The same regulations that specifically interpret the definition of "welfare plan" to include severance pay plans, 29 C.F.R. 2510.3-1(a)(3), make no mention of severance pay in the immediately following provision identifying payroll practices that are excluded from that definition. 29 C.F.R. 2510.3-1(b).[18] These provisions must be construed to-

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[17] As noted above (see note 6, *supra*), appellants have abandoned any argument based on Section 186(c)'s reference to "pooled" severance benefits. Rather, they argue here that as a general matter Congress sought only to regulate those welfare plans that are constituted as a separate entity. But, as we understand their argument, this is merely another way of saying that ERISA only covers plans that are separately funded. The appellant in the related case argues that an ERISA plan must have a separate identity (85-944 J.S. 14-19) and that the plan must be funded (*id.* at 20-23).

[18] The "payroll practices" regulation identifies payroll and other practices that do *not* constitute welfare plans. 29 C.F.R. 2510.3-

gether in order to give effect to each, and one provision should not be construed so as to negate the other. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949). Under appellants' reading of the regulations, however, the "payroll practices" exception would largely nullify the effect of the preceding provisions construing "welfare plan" by excluding from coverage all unfunded severance benefit plans.

Appellants acknowledge that the regulations do not expressly identify severance benefits as a payroll practice. They contend, however, that there is "no logical basis" for treating severance benefits differently than sick leave and holiday and vacation pay, types of benefits that are excluded from coverage by the payroll practice regulation when paid from an employer's general assets (85-441 J.S. 17-18). Their argument misapprehends both the purpose and the effect of the Department's regulations.

Congress did not intend to make ERISA a vehicle for regulating ordinary wage practices. Rather Congress sought in ERISA to regulate the wide variety of fringe benefit programs that had developed as "a means of compensating workers in lieu of increased wages" as a result of wage freezes imposed during World War II and the Korean conflict. S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973); see H.R. Rep. 93-533, 93d Cong., 1st Sess. 2-4 (1973). The Department's purpose in exempting payroll practices is to give effect to the fundamental distinction Congress recognized between wages (and similar types of compensation), which Congress did not intend ERISA to regulate, and fringe benefit compensation, which Congress sought to bring under federal control. Severance benefits,

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1(a)(1). The "payroll practices" enumerated in the regulation include standard forms of employee compensation, such as overtime pay and shift, holiday or weekend premiums (29 C.F.R. 2510.3-1(b)(1)), and various paid leave arrangements, such as sick leave, holidays, and vacations, whereby an employee continues to receive compensation out of the employer's general assets during periods of absence (29 C.F.R. 2510.3-1(b)(2) and (3)).

unlike vacation pay, holiday pay, and sick leave, are invariably paid after or at the time the employee leaves employment. Thus severance benefits are more like unemployment benefits (a type of fringe benefit also listed in the Section 1002 definition of welfare plans) than like wages for days an employee would otherwise be working but for the employer's willingness to excuse him for vacation or sickness. As the Ninth Circuit aptly observed in *Scott*, in contrast to severance benefits, "[t]he practices described in the [payroll practices] regulations require disbursements of funds easily analogized to ordinary wages, and the payments involved invariably take place during the term of employment" (754 F.2d at 1503).

Congress had two broad concerns in enacting ERISA: failure to pay promised fringe benefits to employees, and mismanagement of funds accumulated to finance employee benefits. The Department's regulations exclude from coverage unfunded plans providing vacation and holiday pay and sick leave because, unlike severance benefits, such payments are like ordinary wages and do not reflect either of Congress's concerns. See *California Hospital Ass'n* v. *Henning*, 770 F.2d 856 (9th Cir. 1985), petition for cert. pending, No. 85-1648. The regulations do include within ERISA's coverage plans establishing trust funds for payment of vacation and holiday pay and sick leave; but they do so not because welfare plans must be funded in order to be covered by ERISA, but rather because such trust funds raise the second of Congress's concerns, avoiding mismanagement of benefit funds. Therefore the Labor Department's regulations provide no basis for concluding that severance payments are not employee welfare benefit plans within the meaning of ERISA.

c. Appellants and state amici argue (85-460 J.S. 17 & n.15; States Amici Br. 12, 14) that to be covered by ERISA, welfare plans must have certain "basic features" suggested by the statutory requirements for covered pension plans. Another way of stating this argument is that an employer should not be able to rely on ERISA's preemption provision if the employer has not complied with

ERISA's reporting, disclosure, and fiduciary requirements. But whichever way one states the argument, it has no support in the statute; indeed it stands the statute on its head.

As the district court stated (J.S. App. A28), "[t]he existence of a 'plan' under ERISA is to be determined solely by an examination of the Act's 'coverage' and 'definitional' sections." The ERISA provisions that state "the responsibilities of fiduciaries and administrators of plans covered by ERISA * * * do *not* set forth prerequisites for ERISA coverage" (J.S. App. A29 (emphasis in original)). In other words, if an employer's benefit policy meets the definition of employee welfare benefit plan set forth in ERISA, then the employer must comply with ERISA's reporting, disclosure, and other requirements. He cannot exempt himself from ERISA by refusing to comply with the statute. The Eleventh Circuit has recognized the obvious incongruity of permitting persons who establish or maintain informal or unwritten plans to circumvent the Act merely because an administrator failed to satisfy applicable reporting or fiduciary standards (*Dillingham*, 688 F.2d at 1372). And appellants have not been able to point to anything in the statute or legislative history suggesting that an exception to ERISA's preemption provision should be created as a sort of remedy for noncompliance with ERISA. To the contrary, the remedies for noncompliance are expressly set forth in the statute itself. Section 1132(a) of Title 29 provides injunctive remedies to compel compliance with ERISA, and Section 1131 provides criminal penalties for willful violation of the reporting and disclosure requirements for employee welfare benefit plans.

d. Appellants and state amici argue (85-460 J.S. 10-11; States Amici Br. 5) that Congress could not have intended ERISA to cover, and therefore preempt, state regulation of unfunded severance pay plans because to do so would upset the traditional balance of federal-state regulation in the labor relations field as recognized by this Court in cases such as *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289 (1971). However, cases

construing the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and other federal statutes governing labor-management relations are irrelevant to the question of whether ERISA preempts state laws that relate to covered employee benefit plans. As this Court recently noted, "[u]nlike ERISA, the NLRA contains no statutory preemption provision," and "there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life Insurance Co.*, slip op. 22, 30.

ERISA, unlike the NLRA, explicitly sets forth an expansive preemption command, the legislative history of the Act confirms Congress's intent to occupy the field of employee benefit plan regulation, and this Court has interpreted the operative statutory phrase, "relate to any employee benefit plan," in a broad, literal fashion. *Shaw*, 463 U.S. at 95-100. Moreover, contrary to appellants' and state amici's assertions, the court of appeals' holding does not federalize the entire area of state wage regulation. Rather, it merely precludes state regulation of those specialized forms of compensation covered by ERISA. Nothing in ERISA precludes the states from continuing to regulate routine wage or salary arrangements, or other practices described in the payroll practices regulation.[19]

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[19] Relying on this Court's decision in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), appellants (85-441 J.S. 15) and state amici (Br. 15-16) argue that the decision below, by precluding state law claims of entitlement to severance benefits, improperly limits a participant's remedies for alleged denial of benefits to an ERISA action to enforce the plan's liability while foreclosing an action to enforce an employer's liability under the plan. This argument is without merit. ERISA plainly authorizes plan participants "to enforce * * * the terms of the plan" against any proper defendant from whom relief is available. 29 U.S.C. 1132(a). As appellants recognize, implicit in *Nachman* is the recognition that ERISA authorizes causes of action against an employer as well as against a plan. However, as the court below

To permit state law actions for recovery of benefits under an employee benefit plan would run afoul of ERISA's preemption provision because it would subject ERISA plans and fiduciaries to potentially conflicting benefit liabilities and varying requirements for plan administration depending on the state in which an action was brought.[20] With respect to the single plan at issue in this case, for example, Burlington could be subject to differing duties and responsibilities and liable for different benefits in as many as 16 different states. Congress preempted state laws in ERISA precisely to free plans and their administrators from such inconsistent and varying legal requirements. A participant's or beneficiary's right to benefits under a plan, therefore, must be enforced, if at all, pursuant to ERISA.[21]

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pointed out, "*Nachman* and its progeny were based on federal rather than state law" (J.S. App. A16). The Court in *Nachman* did not address, nor did it have occasion to consider, questions concerning ERISA preemption of state law actions premised on an employer's liability under an unfunded welfare benefit plan. While ERISA preempts state law claims, it expressly provides that it does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States" (29 U.S.C. 1144(d)). Therefore, the fact that an employer is subject to a federal law claim that relates to ERISA does not mean that an employer is subject to a state law claim relating to ERISA. For this reason, state amici's reliance (Br. 17-19) on *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982), is similarly misplaced, since the court there acknowledged that "[t]he employees' contract claim against the employer is not a state law claim" (635 F.2d at 237).

[20] The legislative history of the Act demonstrates that Congress intended contract claims involving ERISA plans to be determined under federal common law. Thus, the sponsors of the Act envisioned that the federal courts would develop "a body of Federal substantive law * * * to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). See also H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974); 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams).

[21] Contrary to state amici's claims (see, *e.g.*, States Amici Br. 4-6), participants and beneficiaries are not powerless to enforce ERISA. They are expressly authorized to bring suit by 29 U.S.C.

Appellants and state amici advert to the irony that, while intending to protect the interests of plan participants and beneficiaries, Congress, by constituting employee benefit plans as exclusively a federal concern, has preempted state statutes that may in some situations provide greater protections than those afforded by the federal statute. But, as we have shown, Congress plainly intended ERISA to cover severance pay plans and consciously preempted all state laws that relate to covered plans in order to provide a favorable environment for the growth of such plans. As the Fourth Circuit concluded in the related case brought by other former Burlington employees, "[t]he fact that employees may sometimes wish to forego [the] advantages of ERISA coverage in favor of arguably more generous state statute[s] does not allow us to escape the clear direction of Congress") 85-929 Pet. App. A24-A25).[22]

1132(a) and may obtain attorney's fees in appropriate cases under 29 U.S.C. 1132(g).

[22] The former Burlington employees who brought suit in North Carolina contend in their petition for a writ of certiorari (85-929 Pet. 24-28) that the courts of appeals have created varying legal rules under ERISA to construe severance pay provisions, and that review by this Court is warranted for that reason. As we have noted (see note 11, *supra*), the Second Circuit in this case decided that Burlington's construction of its severance pay policy ought to be scrutinized because of its failure to comply with ERISA's reporting and disclosure provisions, while the Fourth Circuit in the related case determined that Burlington's construction of its policy is not arbitrary and capricious. The Ninth Circuit has stated that "less deference" is due an employer's construction in circumstances such as those presented here. *Jung*, 755 F.2d at 712. While there are differences in the language used by the courts, as petitioners note, each court purports to apply the arbitrary and capricious standard. It is not clear whether any differences in result will occur, since the Second Circuit has not rejected Burlington's construction of its severance pay provision but instead left that issue for initial determination by the district court. In our view, the question of the appropriate standard of review to apply in cases involving the construction of terms in unfunded welfare plans would benefit from further development by the lower federal courts. If the Court disagrees, it should grant the petition in No. 85-929, limited to Questions 1 and 2.

CONCLUSION

The judgment of the court of appeals should be affirmed. If the Court concludes that an appeal is improper, and treats the jurisdictional statements as petitions for a writ of certiorari pursuant to 28 U.S.C. 2103, the petitions should be denied.

Respectfully submitted.

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